IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 22422

MARY F. CUNNINGHAM, APPELLANT

v.

LITTON INDUSTRIES, A CALIFORNIA CORPORATION, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF AND APPENDIX OF THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE

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INTEREST OF THE UNITED STATES

This appeal presents an important question concerning the time limitation for bringing suit under section 706(e) of Title VII of the Civil Rights Act of 1964. [42 U.S.C. 2000 e -5(e).] The question is whether an alleged victim of employment discrimination who brought suit within 30 days of being notified by the Equal Employment Opportunity Commission of her right to bring suit, but more than 180 days from the date of the claimed act of discrimination, is barred under section 706(e).

The Equal Employment Opportunity Commission is the federal agency charged with the administration of the statutory scheme of which section 706(e) is a part, and the Attorney General has independent responsibilities with respect to that section. For these reasons the United States has a direct and immediate interest in the proper interpretation of section 706(e).

STATEMENT

The plaintiff, Mrs. Cunningham, was employed by the defendant, Litton Industries, in 1961 as publications production technical coordinator (TR 3-4). She was subsequently promoted to the position of publications quality control specialist in which job she received good recommendations and regular salary increases (TR 4). In May, 1965, and again in April, 1966, there were openings in the company in the higher position of publications quality coordinator (TR 4). Mrs. Cunningham was in direct line for these jobs but was denied the promotion solely because of her sex (TR 4). Male employees were appointed who were not as qualified as Mrs. Cunningham (TR 4).

In April, 1966, Mrs. Cunningham protested the appointment and her grievance resulted in it being rescinded temporarily while the male appointee received on-the-job training (TR 5).

In July, 1966,[1] the defendant reappointed the male employee to the position sought by the plaintiff but the paper work was not finally completed until October 1966.

On September 14, 1966, Mrs. Cunningham filed a complaint with the Equal Employment Opportunity Commission, hereinafter referred to as EEOC, claiming she had been denied the promotion because of her sex.[2]

On March 30, 1967, EEOC, after investigation, found "reasonable cause to believe that the [defendant] violated Title VII of the Civil Rights Act of 1964 by discriminating against the [plaintiff] because of her sex, by failing to promote her to "publications quality

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1/ The record does not disclose the date on which the male appointee was reappointed or the date on which Mrs. Cunningham filed her complaint with EEOC. The decision of EEOC, which is judicially noticeable under section 705(a)(c), shows that the male was reappointed in July, 1966, and the complainant filed with EEOC September 14, 1966 (Appendix p. 1, 2). The Court below assumes that the complaint was filed as late as October 7, 1966 (TR 21). In any event, there is no dispute that her complaint to EEOC was timely.

2/ Appendix p. 1.

control coordinator'" (TR 5-6). Thereafter, under section 706(a) of Title VII, EEOC sought without success to conciliate and achieve voluntary compliance by Litton Industries (TR 6).

On June 7, 1967, EEOC formally notified Mrs. Cunningham of its inability to obtain voluntary compliance and of her right to bring suit under section 706(e) within 30 days (TR 6).

On July 6, 1967, within the 30-day period, Mrs. Cunningham filed this action alleging she had been discriminated against on account of her sex by Litton Industries in violation of Title VII of the Civil Rights Act of 1964 (TR 21).

On September 27, 1967, the District Court dismissed Mrs. Cunningham's complaint without leave to amend (TR 21). The Court held that the suit by Mrs. Cunningham was barred under section 706(e) of the Act because it was filed more than 180* days from the date of the claimed discrimination (TR 21-22). The Court assumed that the date of the claimed discrimination could have been October 7, 1966 (TR 21).

Notice of appeal to this court was filed on October 27, 1967 (TR 23-24).

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*The Court arrived at 180 day figure by adding 90 days allowed for filing the charge with EEOC, 60 days allowed for EEOC's administration of the case and, the 30-day notice period.

SPECIFICATION OF ERROR

The District Court erroneously held that a private suit under section 706(e), Title VII, Civil Rights Act of 1964 [42 U.S.C. 2000e-5(e)], filed within 30 days after notice by the Equal Employment Opportunity Commission of its inability to obtain voluntary compliance, but more than "180 days from the date of the claimed act of discrimination" was barred by section 706(e).

ARGUMENT

I. A suit under 706(e) is not barred where a complaint has been properly filed within 90 days with EEOC and such suit was filed within 30 days after notification by EEOC of its failure to conciliate.

A. The Statutory Scheme.

Title VII of the Civil Rights Act of 1964 established a private cause of action to redress employment discriminations. It also set up an administrative mechanism whereby the EEOC would have the opportunity to conciliate and obtain voluntary compliance prior to the filing of private litigation.

Section 706(a), (d), and (e) of the Act establish the mechanics of implementing the policies of the private right of action, 3/ and the administrative efforts for conciliation.

3/ The pertinent provisions of the statute are:

> (a) Whenever it is charged in writing under oath by a person claiming to be aggrieved, or a written charge has been filed by a member

(continued on next page)

Under the Act, the private litigant must afford the Equal Employment Opportunity Commission the chance to conciliate and obtain voluntary compliance. The victim of the alleged discrimination or potential litigant, must:

a. File a written charge with the Equal Employment Opportunity Commission within 90 days of the alleged unlawful employment practice.

3/ (continued from preceding page)

of the Commission where he has reasonable cause to believe a violation of this title has occurred (and such charge sets forth the facts upon which it is based) that an employer, employment agency, or labor organization has engaged in an unlawful employment practice, the Commission shall furnish such employer, employment agency, or labor organization (hereinafter referred to as the 'respondent') with a copy of such charge and shall make an investigation of such charge, provided that such charge shall not be made public by the Commission. If the Commission shall determine, after such investigation, that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion....

* * * *

(d) A charge under subsection (a) shall be filed within ninety days after the alleged unlawful employment practice occurred,

b. File suit within 30 days after notification by the Equal Employment Opportunity Commission of its failure to conciliate the dispute. 4/

3/ (continued from preceding page)

(e) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) (except that in either case such period may be extended to not more than sixty days upon a determination by the Commission that further efforts to secure voluntary compliance are warranted), the Commission has been unable to obtain voluntary compliance with this title, the Commission shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought against the respondent named in the charge (1) by the person claiming to be aggrieved, or (2) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice.

4/ This procedure relates only to situations where the Commission has found reasonable cause that a violation of Title VII exists. We are not concerned with the litigants' right to sue and the time limitations for bringing suit if the Commission finds that no reasonable cause exists that there is a violation.

EEOC under this statutory scheme is directed to investigate the charge to ascertain whether there is reasonable cause to believe that the charge is true and, if so, to endeavor to eliminate the unlawful employment practice by conciliation, and if unsuccessful, to notify the victim of its failure to conciliate the dispute. The statute places an obligation on the Commission to accomplish this within 30 days, or within 60 days if it extends the time.

B. Policy and Legislative History.

In our view, the District Court's decision was based on an erroneous construction 5/ of section 706(e).

What the District Court did was to add up each of the time limitations of section 706(d)(e) (90 days for filing the complaint with the EEOC, 60 days for finding reasonable cause and conciliation, and 30 days for filing suit) and ruled that under the statute suit must be filed within 180 days of the alleged unlawful employment practice.

5/ Implied in this premise, in our view, is the additional erroneous assumption that the statute imposes a mandatory obligation on the Commission to accomplish its function within a maximum of 60 days.

To adopt the District Court's construction of the time limitations of section 706(e) would place a litigant in the anomalous position of being penalized for a delay for which EEOC is solely responsible and over which he has no control. Ward v. Firestone Tire and Rubber Co., 260 F. Supp. 579, 580 (W.D. Tenn. 1966). Indeed, under this construction of section 706(e), Mrs. Cunningham, on the facts of this case, would be barred from suit at the very time EEOC first found reasonable cause to believe that her complaint was true, 6/ a clearly untenable result.

Such a construction, we contend, runs contrary to the intent of Congress. This intent is evidenced in the Dirksen-Mansfield compromise in the Senate which left court enforcement of violations of Title VII (other than pattern and practice violations) to private actions brought by the aggrieved individuals. The bill, which initially passed the House authorized EEOC to bring a civil

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6/ For, whether one views the action of discrimination as occurring in July or October, 1966, the Commission's finding of reasonable cause on March 30, 1967, occurred more than 180 days after such act of discrimination.

it to stop any unlawful employment practice if efforts voluntary compliance failed. It seems clear that this ange indicates a legislative preference for a division of sponsibility in the mechanism for enforcing Title VII, th EEOC responsible for conciliation and the aggrieved rty responsible for court enforcement. To allow problems thin the statutory province of EEOC over which the liti- nt was given no responsibility by Congress to govern his ght of suit, would run contrary to the intent of Congress.[7/]

Moreover, the decision of the District Court would ve the further effect of thwarting the intent of Congress providing a threshold scheme of attempting to solve dis- imination disputes through conciliation. For to require at suit must be filed within 180 days after the alleged t of discrimination without regard to the status of EEOC's forts would, as we see it, diminish the possibility of mpliance through private informal conference and concili- ion. Such a rule is particularly troublesome in view of e already burdensome case load of EEOC, which inevitably s resulted in an inability to complete the conciliation ocess within 60 days in every case, Evenson v. Northwest rlines, 268 F.Supp. 29 (E.D. Va. 1967). The Commission s well aware of this problem when it amended its regulations read:

7/ See colloquy between Senator Douglas and Senator Pastore, 110 Cong. Rec. 13695, June 17, 1964.

> (a) The time for processing all cases is extended to 60 days except insofar as proceedings may be earlier terminated pursuant to §1601.19.
> (b) Notwithstanding the provisions of paragraph (a) of this section, the Commission shall not issue a notice pursuant to §1601.25 prior to a determination under §1601.19 or, where reasonable cause has been found, prior to efforts at conciliation with respondent, except that the charging party or the respondent 8/ may upon the expiration of 60 days after the filing of the charge or at any time thereafter, demand in writing that such notice issue, and the Commission shall promptly issue such notice to all parties. 9/

The regulation 10/ clearly evidences an intent to fulfill the statutory scheme outlined above by allowing conciliation attempts to continue as long as they may appear fruitful while giving either party the power to precipitate the final Commission action necessary as a prerequisite for suit. Thus, final control over the institution of a suit is left to the private parties and not to the Commission, as was the intent of Congress.

8/ It should be noted that Litton Industries at no time demanded that such notice be issued.

9/ 29 C.F.R., §1601.25a (Jan. 1, 1967).

10/ See Also the Digest of EEOC Legal Interpertations, BNA 401.1020G (March 30, 1967).

C. Cases:

1. Section 706 cases

Federal courts have unanimously recognized that a private party fulfills the prerequisites imposed upon him by the statutory scheme when he files his charge with EEOC within 90 days of the alleged unlawful practice and files his suit within 30 days after notification by EEOC of its failure to conciliate. Anthony v. Brooks, 12 RRLR 1419, 1420; 65 LRRM 3074 (N.D. Ga. 1967); Quarles v. Phillip Morris, 271 F.Supp. 842 (E.D. Va. 1967); Evenson v. Northwest Airlines, 268 F. Supp. 29 (E.D. Va. 1967); Bowe v. Colgate-Palmolive Company, 272 F. Supp. 332 (S.D. Ind. 1967); Moody v. Albemarle Paper Company, 271 F. Supp. 27 (E.D. N.C. 1967); Stebbins v. Nationwide Mutual Insurance Company, 382 F.2d 267 (C.A. 4, 1967). Cf. Choate v. Caterpillar Tractor Co., 274 F. Supp. 776 (S.D. Ill. 1967). These courts have further recognized that in order to carry out the dual enforcement system intended by Congress, the time limitations placed upon EEOC must be viewed as directory rather than mandatory, at least insofar as it would affect a private party's right to sue.

In Mondy v. Crown Zellerbach Corporation, et al, 271 F.Supp. 258, 261 (E.D. La. 1967), the plaintiff filed his complaint with EEOC within the ninety-day period of limitation, but the notification from EEOC of determination of conciliation did not issue until more than

five months after the charge was filed. Plaintiff sued within thirty days thereafter and defendants moved to dismiss on the ground that the suit was barred by the time provisions of section 706(e), thus presenting precisely the same question decided by the Court below in the present case. The District Court held in Mondy:

> The difficulty with the defendants' argument is that it places any person wishing to sue under Title VII in an impossible position. If such a party tried to sue within the ninety day period without first receiving the statutory notice, he would be met with the objection that he was suing prematurely, since 42 U.S.C.A. §2000e-5(e) says that he may bring a civil action after being notified by the Commission of its failure to obtain voluntary compliance. (Emphasis added).

See Also Dent v. St. Louis-San Francisco Railway Company, 265 F. Supp. 56, 58 (N.D. Ala. 1967); Mickel v. South Carolina State Employment Service, 377 F. 2d 239 (C.A. 4, 1967). 11/

11/ The District Court's reliance on Hall v. Werthan Bag Corporation, 251 F. Supp. 184 (M.D. Tenn. 1966), is misplaced. There the Court simply held that an intervenor who had not pursued his administrative remedies under section 706(e) was not entitled to relief in the form of back pay or reinstatement. The issue before this Court is inapposite to the one represented in Hall.

2. Statute of limitations cases in general

It is well settled that a litigant's time for instituting an action, when the right to sue is contingent upon notice from a Federal agency, does not begin to run while the litigant awaits such notification. In Crown Coat Front Co. v. United States, 386 U.S. 503, 514 (1967), the Supreme Court stated in relation to a dispute under the Wunderlich Act, 28 U.S.C. 1346, and the applicable statute of limitations, 28 U.S.C. 2401(a), that:

> To hold that the six-year time period runs from the completion of the contract, as the Government insists, would have unfortunate impact. The contractor is compelled to resort to administrative proceedings which may be protracted and which may last not only beyond the completion of the contract but continue for more than six years thereafter. If the time bar starts running from the completion date, the contractor could thus be barred from the courts by the time his administrative appeal is finally decided. This would be true whether he wins or loses before the board of appeals. Even if he prevailed there and was granted the equitable adjustment he sought, the Government would be immune from suit to enforce the award if more than six years had passed since the completion of the contract. This is not an appealing result, nor, in our view, one that Congress intended.

ee Northern Metal Co. v. United States, 350 F.2d 833, 38-839 (C.A. 3, 1965), which held that a statute of imitations was tolled with respect to an action under he Suits in Admiralty Act during the pendency of required dministrative action before contracting officers and the rmed Service Board of Contract Appeals. See also United ontractors v. United States, 368 F.2d 585, 593-594 (Ct. f Cl. 1966); Nager Electric Company, Inc. v. United States, 68 F.2d 847, 855, 865 (Ct. of Cl. 1966); N.V. Philips' loeilampenfabrieken v. A.E.C., 316 F.2d 401, 406 (D.C. ir. 1963). Cf. Steel Improvement & Forge Co. v. United tates, 355 f.2d 627, 630-631 (Ct. of Cl. 1966).

Moreover, our construction of the time limitations ontained in section 706(e) will not subject employers to he burden of having to defend stale claims after records ave been destroyed and witnesses' memories have dimmed. nder the Commission's regulations [29 C.F.R. §1601.25a, an. 1, 1967, supra], either party may demand that a notice f failure to conciliate be issued at any time after 60 days ave elapsed from the date the charge was filed with the ommission. Hence, each party has the option of permitting he conciliation efforts to continue or, alternatively, of equiring the statutory notice to issue, thereby insuring hat any litigation will be begun within 30 days.

The facts of the present case show that Litton has ot been prejuiced by the fact that plaintiff's suit was

ot instituted within the 180-day period the District Court eemed to be the period of limitations. The March 10, 1967, ecision of EEOC[12/] indicates that service of the charge on itton occurred on October 4, 1966. Thereafter, the company as aware that Mrs. Cunningham was actively pursuing her itle VII remedy and it had an opportunity to prepare any roof it desired to use to rebut the charge. See Burnett v. ew York Central Railroad Co., 380 U.S. 424 (1965).

. Summary

In summary, our view of the statute is supported by: 1) the statutory language and the enforcement scheme contained therein; (2) the underlying policy and legislative istory of Title VII; (3) EEOC's own regulations implementing ection 706(e); (4) the unanimous authority of the cases olding that notification by EEOC of its inability to obtain oluntary compliance is a prerequisite to suit and that the ime limitations placed upon EEOC are directory rather than andatory; and (5) the general law relating to statutes of imitation as applied to the facts of this case.

/ Appendix, p. 1.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the order of the District Court should be reversed and remanded to the District Court for a trial on the merits.

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CERTIFICATION

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit (and have inquired of the Clerk's Office thereof, for the purpose of ascertaining the propriety of filing a brief in this case which is not printed and have received an affirmative response to such inquiry) and that, in my opinion, the foregoing brief is in full compliance with those rules.

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A P P E N D I X

C O P Y

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

Mary F. Cunningham
Charging Party

Case No. 6-12-9113
LA 6-9-15

vs.

Litton Industries
Guidance and Control Systems Division
Woodland Hills, California
Respondent

Date of filing: September 14, 1966
Date of service of charge: October 4, 1966

DECISION

SUMMARY OF CHARGE

The Charging Party alleges discrimination on the basis of her sex in that the Respondent Company promoted two men, successively, to jobs as Publications Quality Control Coordinators when she should have been promoted to this job classification on the basis of her experience with the Respondent Company and her superior qualifications.

SUMMARY OF INVESTIGATION

The Respondent is one of four Guidance and Control Systems Divisions of Litton Industries and is engaged in the development and manufacture of inertial guidance systems. Litton Industries is a heavy Government contractor and employs over 6000 persons at the Respondent facility.

The Charging Party is a high school graduate whose work history prior to employment with the Respondent consisted of three and one half years experience as a Stenographer and five years experience as a Layout Typist and Publications Technician. Her duties consisted of technical typing,

layout, editing, proofreading, and stripping and opaquing negatives. She obtained employment with the Respondent in October 1961 as a Publications Production Technical Coordinator at a salary of $110 per week. About a year later, she was transferred from the Technical Publications Production Group, where her performance was evaluated a "superior", to the Publications Quality Control Group at a salary of $125.60 per week. About a half year later -- in May 1963 -- she was promoted to her present position as a Publications Quality Control Specialist at a salary of $130.40 per week. In this capacity, she has been rated "exceptionally competent" and has been receiving bi-annual salary increases. Thus, when openings occurred for the position of Publications Quality Control Coordinator, the Charging Party felt that she was more qualified to fill one of these positions than either a male Technical Writer who was appointed to the position in May 1965, or a male Technical Writer who was appointed to the position on October 1966. (The Technical Writer who was appointed on October of 1966 was initially promoted to the position in April 1966 and when the Charging Party filed a grievance that same month, the Respondent rescinded his promotion. In July 1966, he was placed in the position of Quality Control Coordinator and the Respondent delayed making the paperwork effective until October 3, 1966.)

The male who was appointed to the position of Publications Quality Control Coordinator in May 1965 had approximately two and one half years training in Engineering on the junior college and university level, a course in Electronics in the Navy, and a course in Technical Writing, had worked as a Technical Writer approximately a year prior to being employed in this same capacity by the Respondent in June 1964 at a salary of $175 per week. He was promoted to the position of P. Q. C. C. less than a year later at a salary of $192.80.

The male who was appointed to the position of P. Q. C. C. in October 1966 had a junior college degree in Business Administration, approximately three and one half years experience in technical writing, coordinating and quality control prior to his employment by the Respondent as a

Technical Writer in November 1961. He received regular bi-annual increases and was earning $181 at the time of his promotion to Publications Quality Control Coordinator at a salary of $187. Although he, as a Technical Writer, was a higher salaried person than the Charging Party, as a Publications Quality Control Specialist, she had reviewed his work as recently as March 1966.

According to job descriptions for Publications Quality Control Coordinator submitted by three Managers in Technical Publications Division 02-514, the ability to perform as a Publications Quality Control Specialist is an essential qualification for the job as Coordinator. But in none of the three submitted job descriptions is actual experience as a Technical Writer indicated as an essential qualification for the Coordinator job.

When the Charging Party issued a written complaint on 4-11-66 to the Respondent's Industrial Relations Department in regard to the pending promotion of one of the male Technical Writers the Respondent failed to properly handle her grievance and caused excessive delay. In spite of the recommendation by the Employees Relations Specialist of the Industrial Relations Division that the Charging Party be promoted to the job in contention, this recommendation was not followed.

By promoting the male Technical Writer in July 1966 and delaying until October the paperwork making the promotion official, the Respondent provided him with on-the-job training in this position, which was not granted to the Charging Party.

DECISION

Reasonable cause exists to believe that the Respondent violated Title VII of the Civil Rights Act of 1964 by discriminating against the Charging Party because of her sex, by failing to promote her to the job of Publications Quality Control Coordinator.

For the Commission

[Seal Affixed]

March 30, 1967
Date

(Signed Marie D. Wilson)
Marie D. Wilson
Secretary

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief and attached Appendix have been served this date by United States air mail, special delivery, in accordance with the rules of this Court, to each of the attorneys for the appellants and the appellees as follows:

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